

# COMMENT

## ASYLUM LAW AND FEMALE GENITAL MUTILATION: “MEMBERSHIP IN A PARTICULAR SOCIAL GROUP” INADEQUATELY PROTECTING PERSECUTED WOMEN

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## I. INTRODUCTION

The U.S. [A]ttorney [G]eneral is trying to prevent immigration authorities from sending a Muslim woman to her home country, where she was a victim of female genital mutilation. In a stinging order overriding federal immigration courts, [Attorney General] Mukasey blasted a decision that said a 28-year-old citizen and native of Mali should be expelled "because her genitalia already had been mutilated [so] she had no basis to fear future persecution if returned to her home country." Calling the rationale "flawed," Mukasey sent the case back to the Board of Immigration Appeals with orders to reconsider. The woman, a native of Mali, begged the court not to send her back to her Bambara tribe. The 28-year-old said if she returned and had a daughter, the child also would be subject to mutilation. The woman also said she faced forced marriage if she had to go home. Mukasey cited what he concluded were two significant factual errors in the court's rejection of her appeal.<sup>1</sup>

The Mali woman's claim, in the case of *In re A-T*,<sup>2</sup> involves a form of persecution referred to as female genital mutilation (FGM), which encompasses a wide range of procedures that involve the removal or alteration of a woman's external genitalia for non-medical reasons.<sup>3</sup> Women persecuted this way make their way to the United States, but are denied asylum due to the ambiguous asylum law. There is no doubt that women

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1. Terry Frieden, *AG: Don't Deport Genital Mutilation Victim*, CNN.COM, Sept. 22, 2008, <http://www.cnn.com/2008/WORLD/africa/09/22/genital.mutilation.immigrant/index.html> (describing the order of Attorney General Mukasey). The Mali woman's claim for asylum was denied by the Board of Immigration Appeals, but Attorney General Mukasey intervened in the case where the Mali woman attempted to establish her asylum claim based on membership in a particular social group—one that believes in conducting female genital mutilation procedures. *Id.*

2. *In re A-T*, 24 I. & N. Dec. 617 (A.G. 2008).

3. See Tiaji Salaam et al., *Female Genital Mutilation (FGM): Background Information and Issues for Congress* 1 (Cong. Research Serv., CRS Report for Congress, Order Code RS21923, Aug. 27, 2004) ("It is estimated that 2 million girls in the Middle East and Africa are subjected to the procedure per year.").

subjected to this treatment deserve protection. Yet the asylum provisions and case law interpreting the law has instead created a confusing set of hurdles to acquire the protection available.

FGM is classified into four main categories that range from partial or total removal of the female organs to harmful procedures such as pricking, piercing and scraping the female genitalia.<sup>4</sup> FGM is also known by various other names such as female genital cutting (FGC), female genital alteration, or female circumcision, and it involves many different surgical procedures.<sup>5</sup> The World Health Organization estimates that currently 100 to 140 million women worldwide have undergone FGM with approximately 3 million girls in Africa at risk annually.<sup>6</sup> FGM is a cultural practice prevalent in “western, eastern, and north-eastern regions of Africa,” and in some Asian and Middle-Eastern nations.<sup>7</sup> It is widely considered a human rights violation by most international organizations and Western countries, including the United States.<sup>8</sup>

The United States Attorney General rarely issues an opinion on a Board of Immigration Appeals (BIA) decision, and the *In re A-T* opin-

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4. World Health Organization, Female Genital Mutilation Fact Sheet, <http://www.who.int/mediacentre/factsheets/fs241/en/index.html> (last visited May 11, 2009). The World Health Organization (WHO) classifies the FGM procedures into the following four categories:

[Type 1:] Clitoridectomy: partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and, rarely, the prepuce (the fold of skin surrounding the clitoris) as well.

[Type 2:] Excision: partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (the labia are “the lips” that surround the vagina).

[Type 3:] Infibulation: narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, and sometimes outer, labia, with or without removal of the clitoris.

[Type 4:] Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area. *Id.*

5. See United Nations Population Fund, Frequently Asked Questions on Female Genital Mutilation/Cutting, [www.unfpa.org/gender/practices2.htm#8](http://www.unfpa.org/gender/practices2.htm#8) (last visited May 11, 2009). The World Health Organization defines FGM as “all procedures that involve partial or total removal of external female genitalia or other injury to the female genital organs for non-medical reasons.” World Health Organization, Female Genital Mutilation Fact Sheet, <http://www.who.int/mediacentre/factsheets/fs241/en/index.html> (last visited May 11, 2009).

6. WORLD HEALTH ORG., ELIMINATING FEMALE GENITAL MUTILATION: AN INTER-AGENCY STATEMENT 1 (2008), [http://www.who.int/reproductive-health/publications/fgm/fgm\\_statement\\_2008.pdf](http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf).

7. World Health Organization, Female Genital Mutilation Fact Sheet, <http://www.who.int/mediacentre/factsheets/fs241/en/index.html> (last visited May 11, 2009). Organizations such as the World Health Organization, the United Nations Children’s Fund, and the United Nations Population Fund formally condemned FGM. *Id.*

8. See *id.*

ion, mentioned above, is based on two factual errors.<sup>9</sup> The first is that FGM is not a one-time act of persecution, but can be inflicted multiple times.<sup>10</sup> The second is that the BIA did not establish that the persecution occurred on account of membership in a social group.<sup>11</sup> Instead, the BIA assumed there was a social group.<sup>12</sup> These errors will be further examined throughout the Comment since, together, the errors are the paradigm of conflict in this aspect of asylum law.

To understand the weight of Attorney General opinions, the BIA must also be explained to some degree. The BIA is not a federal court, but issues administrative decisions that are binding on the immigration community and subject to judicial review by federal courts.<sup>13</sup> The immigration courts decide approximately 40,000 cases a year.<sup>14</sup> The Attorney General "has issued an opinion on a case only three times in the past three years."<sup>15</sup> Although FGM-based claims have recently received much attention, the conflict surrounding gender-based claims developed over fifty years ago. In 1951, the United Nations drafted the Convention Relating to the Status of Refugees (hereinafter: Convention), which is the national authority defining a refugee and the responsibility of countries

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9. Terry Frieden, *AG: Don't Deport Genital Mutilation Victim*, CNN.COM, Sept. 22, 2008, <http://www.cnn.com/2008/WORLD/africa/09/22/genital.mutilation.immigrant/index.html>.

10. See *In re A-T-*, 24 I. & N. at 621 ("[T]he Board [of Immigration Appeals] based its analysis on a false premise: that female genital mutilation is a 'one-time' act that cannot be repeated on the same woman."). Many courts recognized that FGM can be repeated. *Id.*; see also *In re S-A-K-* and *H-A-H-*, 24 I. & N. Dec. 464, 465 (B.I.A. 2008) (explaining that the applicant's "vaginal opening was sewn shut" about five times "after being opened to allow for sexual intercourse and child birth").

11. See *In re A-T-*, 24 I. & N. at n.6 (directing the Board to revisit or clarify "whether a fear of future harm is 'related' to past persecution on account of membership in a particular social group," which the Board did not do in this case). Determining membership in a particular social group will often require, as a threshold matter, defining what the particular social group is. *Id.*

12. *Id.* at 620 ("The Board assumed *arguendo* that respondent in the present case was, like the applicant in *Kasinga*, a member of a particular social group.").

13. See U.S. Citizenship and Immigration Services, BIA Decisions, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2c29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=f2c29c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited May 12, 2009) ("Decisions of the BIA are binding on all DHS officers and Immigration Judges unless modified or overruled by the Attorney General or a Federal court.").

14. Terry Frieden, *AG: Don't Deport Genital Mutilation Victim*, CNN.COM, Sept. 22, 2008, <http://www.cnn.com/2008/WORLD/africa/09/22/genital.mutilation.immigrant/index.html>.

15. *Id.*

granting asylum.<sup>16</sup> There are a number of grounds for asylum applicants' claims that would trigger international protection from persecution, but none of them include gender or sex.<sup>17</sup> Some experts reason there is not an overwhelming need for an express reference as long as the Convention is interpreted without discrimination against women.<sup>18</sup>

Most of the gender issues that arise in asylum claims concern women. According to the United Nations High Commission on Refugees (UNHCR), around 74% of the worldwide refugee claims are for women and children.<sup>19</sup> Additionally, in numerous societies, women are powerless, which makes them vulnerable.<sup>20</sup> In turn, they become easy targets for persecution and other harm.<sup>21</sup> Many societies condone such treatment and some governments overlook the situations entirely.<sup>22</sup> Males comprise most of the refugee population since they are more able to travel to industrialized countries.<sup>23</sup> Consequently, asylum procedures have sometimes developed to implicitly respond to male experiences.<sup>24</sup> Since there is little indication that states would modify the 1951 Convention to add an additional protected ground specifically for gender or sex, the reality is that the immigration community will continue to grapple with these gender issues within the already constructed framework.<sup>25</sup> Those protected grounds of asylum are limited to the following: race, re-

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16. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

17. See Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2006) (defining the term "refugee"). The applicant must be "unable or unwilling to avail himself or herself of the protection of that country because of the persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." *Id.*

18. UNITED NATIONS HIGH COMM'R FOR REFUGEES, REFUGEE PROTECTION IN INTERNATIONAL LAW 326-27 (Erika Feller, Volker Turk, & Frances Nicholson eds., 2003) ("The text, object, and purpose of the 1951 Convention require a gender-inclusive and gender-sensitive interpretation."). "[A] misconceived interpretation can reflect and reinforce gender biases leading to the marginalization of women in the refugee context." *Id.*

19. UNITED NATIONS HIGH COMM'N ON REFUGEES, UNHCR STATISTICAL YEARBOOK 2007, POPULATION LEVELS AND TRENDS 34 (2008), <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=4981c3252&tbl=STATISTICS> (showing how women make up for 47% of asylum seekers and children make up 27% of asylum seekers).

20. See THOMAS ALEXANDER ALIENIKOF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 902-03 (6th ed. 2008).

21. See *id.*

22. See *id.*

23. See *id.* at 903.

24. See *id.*

25. See THOMAS ALEXANDER ALIENIKOF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 902 (6th ed. 2008).

ligion, nationality, membership in a particular social group, and political opinion.<sup>26</sup> Women and children regularly use the “membership in a particular social group” ground when seeking asylum for gender-based claims.<sup>27</sup>

When and how do women or certain sub-sets of women comprise a particular social group? Sometimes they are successful at establishing their social group and sometimes they are not. The definition of “social group” is broad yet defined narrowly by decision makers. So, the victimized women are left with an unpredictable hurdle they hope to overcome when applying for asylum in the United States. Women who fear undergoing FGM can constitute a social group as long as they can prove that they belong to a tribe or clan that practices FGM.<sup>28</sup> The recent decision by Attorney General Mukasey seems to pronounce that even women who have undergone FGM *may* constitute a social group.<sup>29</sup> Part of the BIA’s flawed decision is due to the focus on the FGM as a form of persecution rather than the social group that widely practices that form of persecution.<sup>30</sup> The Attorney General’s direction to the BIA forces it to address the broader issue about what constitutes a social group in the FGM context.<sup>31</sup> Although case law already established that FGM may serve as a form of persecution, if the precedent changes upon the Board’s review of *In re A-T-*, that could have dire consequences on the women seeking asylum due to persecution by FGM and potentially even other gender-based claims such as claims based on domestic violence.

The question now becomes what is the social group for women who have undergone FGM and how should that be decided? This Comment will expose the difficulties of defining a social group and focus on how female genital mutilation victims establish their membership in a particular social group. Finally, it will propose a solution where membership in a particular social group is avoided altogether for victims of FGM.

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26. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2006).

27. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 377 (B.I.A. 1996) (considering gender-based asylum claims “within the ‘membership in a particular social group’ construct”).

28. See *id.* at 365–66 (recognizing that “young women of the Tachamba-Kunsuntu Tribe who have not had FGM, as practiced by the Tribe, and who oppose the practice” constitute a social group).

29. See *In re A-T-*, 24 I. & N. at 621.

In the present case, the Board rejected a claim for withholding of removal by a woman who had *previously* been subjected to female genital mutilation, reasoning that because her genitalia already had been mutilated she had no basis to fear future persecution if returned to her home country. For the reasons stated below, I conclude that this decision was flawed . . . *Id.*

30. See *id.* at 622 (comparing this situation to one faced in another case where the court did find that victims of FGM were members of a particular social group).

31. See *id.* at 623.

## II. LEGAL BACKGROUND

### A. *History of Refugee and Asylum Law*

Asylum is not an everyday discussion topic, although the topic has sprung up recently since Iraqis continue seeking asylum in the United States.<sup>32</sup> The initial discussion and development of refugees percolated at the conclusion of World War II.<sup>33</sup> That time was the impetus for asylum efforts made internationally, particularly for Jewish refugees<sup>34</sup> seeking protection in the United States and in many other countries.<sup>35</sup> For the next three decades following the War, in the United States there was legislation and special programs enacted for displaced persons. The 1951 Convention Relating to the Status of Refugees, an international legal instrument defining refugees, was adopted by the United Nations, which solidified the international efforts.<sup>36</sup> The United States signed onto the 1967 Protocol Relating to the Status of Refugees, binding the country to the international treaty's substantive provisions of this Convention.<sup>37</sup> Landmark legislation enacted in the United States two years before the United States became a signatory to the aforementioned Protocol abolished the previous quota system and adopted a provision admitting numbers of overseas refugees who had fled a "Communist or Communist-dominated country."<sup>38</sup> At this time in history, there was a world-wide

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32. See *Fewer Iraqis Seeking Asylum*, L.A. TIMES, Oct. 18, 2008, at A3 (reporting that approximately 20,000 Iraqis applied for asylum in the first six months of 2008).

33. See THOMAS ALEXANDER ALIENIKOF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 847 (6th ed. 2008) (discussing that "[t]here was little systematic attention in the United States to providing asylum to refugees prior to the end of World War II"). The focus of the 1951 Convention was on the situation of European countries harboring millions of displaced persons who had been uprooted and were unlikely to leave their new country of residence. *Id.* at 846. The Convention's major purpose was to clarify questions surrounding the status of these refugees already in place. *Id.*

34. See *id.*

35. See generally JOHN HOPE SIMPSON, THE REFUGEE PROBLEM (1939) (explaining how the refugee law developed along with the challenges associated with this new realm of protection).

36. See generally UN HIGH COMM'R FOR REFUGEES, THE 1951 REFUGEE CONVENTION: QUESTIONS AND ANSWERS (2007), <http://www.unhcr.org/basics/BASICS/3c0f495f4.pdf> (describing the reasons and protections for the refugee Convention).

37. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

38. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (1965) (codified as amended in scattered sections of 8 U.S.C.).

effort to provide necessary protection for deserving persons, and that is the basis for the development of refugee and asylum law.<sup>39</sup>

The word "asylum" did not appear in United States law until 1980, with the enactment of The Refugee Act of 1980.<sup>40</sup> Prior to that year, someone could be considered a refugee, which was determined before entering the United States.<sup>41</sup> The Act established the "asylum status" which allowed for an asylee to remain in the United States indefinitely.<sup>42</sup> It was a status granted when the person was either at the United States border or already inside the country.<sup>43</sup> More recently, asylum law developed with the enactment of the USA PATRIOT Act passed by Congress in 2001, which expanded the bars to asylum.<sup>44</sup> Even more recently, the Real ID Act of 2005 added requirements for credibility determinations in asylum claims.<sup>45</sup> The heart of asylum law, however, relates to how refugee status

39. See UN HIGH COMM'R FOR REFUGEES, THE 1951 REFUGEE CONVENTION: QUESTIONS AND ANSWERS, <http://www.unhcr.org/basics/BASICS/3c0f495f4.pdf>.

40. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.) (establishing standards for assistance to refugees); see also REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 24 (5th ed. 2007) (mentioning that the Act "created a legal framework for refugees to apply from abroad and for asylum-seekers to apply from within the United States").

41. See REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 24 (5th ed. 2007).

42. See JOSEPH A. VAIL, ESSENTIALS OF REMOVAL AND RELIEF: REPRESENTING INDIVIDUALS IN IMMIGRATION PROCEEDINGS 139 (2006) (stating that an applicant for asylum "must prove he or she is also unable or unwilling to return to the country of nationality, or if homeless, of last habitual residence, and is unable or unwilling to avail him- or herself the persecution of that country").

43. See *id.* (requiring only that the person be out of country he or she is seeking refuge from).

44. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, (USA PATRIOT Act) Pub. L. No. 107-56, 115 Stat. 272 ("An act to deter and punish terrorist acts in the US and around the world, to enhance law enforcement investigatory tools, and other purposes.").

45. Real ID Act of 2005, Pub. L. No. 109-13, Div. B, §101(a)(3)(B)(iii), 119 Stat. 231, 302-03 (2005) (codified as amended at 8 U.S.C. § 1158(b)(1)(B)(iii) (2006)).

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determina-



and asylum are closely linked because to be eligible for asylum in the United States a noncitizen or alien must satisfy the statutory definition of refugee.<sup>46</sup> This Comment will focus on asylum, in particular, although it is important to understand the three main persecution-based forms of relief for asylum seekers.

## B. *Statutory Requirements for Asylum*

For practical purposes, persons in the United States applying for asylum also apply for withholding of removal and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>47</sup> CAT is not normally thought of as traditional refugee law, and therefore, gender-based claims generally are afforded protection under either asylum or withholding of removal.<sup>48</sup> The great benefit of being granted asylum is fully understood when compared to another form of relief, withholding of removal. It is usually a companion form of relief to asylum<sup>49</sup> and is a mandatory form of relief with more stringent statutory requirements<sup>50</sup> that affords less protec-

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tion is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. *Id.*

46. See REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 25 (5th ed. 2007) ("Under §208(b) of the INA, the [A]ttorney [G]eneral (AG) may, in his or her discretion, grant asylum to an individual who qualifies as a 'refugee' within the meaning of INA §101(a)(42).").

47. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (proscribing various methods of torture that member states must abide by); see DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 2-7 (Paul T. Lufkin ed., 3d. ed. 1999) ("[A]sylum status, withholding protection, and refugee status are based on provisions of the 1951 Convention relating to the Status of Refugees.").

48. See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 6 (Paul T. Lufkin ed., 3d ed. 1999) (discussing the Convention Against Torture). Rooted in international human rights law, CAT relief fundamentally prohibits torture and nonrefoulement is absolute. *Id.* There is a higher standard to prove harm since torture is the harshest form of persecution. *Id.* In other words, there are types of persecution that do not rise to the level to qualify as torture. *Id.* CAT relief is evolving and it is critical as it "fills protection lacunae in the refugee law regime." *Id.*

49. See *id.* at 5 (stating that an applicant for asylum also is considered an applicant for withholding of removal as "promulgated pursuant to the statute"). Withholding of removal is also based on the 1951 Convention's article 33 obligation of nonrefoulement or non-return. *Id.*

50. See Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3)(A) (2006) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

tion.<sup>51</sup> This type of relief does not allow for the adjustment of status or the ability to bring in family members.<sup>52</sup>

When granted asylum, the asylees are allowed to work, to bring in immediate family members to the United States, and to access some public assistance.<sup>53</sup> They are also permitted to adjust their status to that of a legal permanent resident (LPR) after a year in the United States.<sup>54</sup> Seeking asylum can be accomplished upon arrival into the United States or it may be raised as a defense during a removal proceeding.<sup>55</sup> The alien<sup>56</sup> has the burden of proof to demonstrate that he or she meets the eligibility requirements for asylum.<sup>57</sup> The applicant must have filed the application within one year of arriving into the United States if he or she is seeking asylum affirmatively rather than defensively.<sup>58</sup> Therefore, asylum is the first preference when seeking relief from removal from the United States.

As mentioned earlier, the requirements for asylum are derived from the definition of refugee, and those requirements are numerous. The applicant must establish a well-founded fear of future persecution.<sup>59</sup> Relief with withholding of removal requires the applicant show a “clear

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51. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 5–6 (Paul T. Lufkin ed., 3d ed. 1999) (describing withholding of removal protection). “Withholding only protects a person from return to the country of persecution”; it does not allow for the person to remain in the United States under a certain status. *Id.*

52. See generally Yule Kim, *Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?* 4–5 (Cong. Research Serv. CRS Report for Congress, Order Code RL345878, Oct. 10 2008), available at [http://assets.opencrs.com/rpts/RL34587\\_20081010.pdf](http://assets.opencrs.com/rpts/RL34587_20081010.pdf) (explaining the disadvantages of withholding of removal).

53. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 4–5 (Paul T. Lufkin ed., 3d ed. 1999).

54. See *id.*

55. Yule Kim, *Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?* 2 (Cong. Research Serv. CRS Report for Congress, Order Code RL345878, Oct. 10 2008), available at [http://assets.opencrs.com/rpts/RL34587\\_20081010.pdf](http://assets.opencrs.com/rpts/RL34587_20081010.pdf).

56. Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006) (defining an alien as “any person not a citizen or national of the United States”).

57. 8 C.F.R. § 208.13(a) (2003) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the [Immigration and Nationality] Act.”).

58. Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) (2006) (stating the time limit in which an asylum applicant must file an application); see DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 5 (Paul T. Lufkin ed., 3d ed. 1999); THOMAS ALEXANDER ALIENIKOF ET AL., *IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY* 849–851 (6th ed. 2008).

59. Immigration and Nationality Act § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006) (stating the eligibility requirements for granting asylum, which hinges on meeting the definition of “refugee”); 8 U.S.C. § 1101(a)(42) (2006) (defining the term “refugee” and including the requirement of having a “well-founded fear of persecution”).

probability” of future persecution.<sup>60</sup> There are also various bars and ineligibility grounds, which are primarily based on the 1951 Convention.<sup>61</sup> For asylum claims, the applicant must show three things: (1) he or she has a “well-founded fear of persecution,” (2) the persecution was on account of a protected ground, and (3) he or she belongs to the protected ground, those being race, religion, nationality, membership in a particular social group, or political opinion.<sup>62</sup> The protected grounds are all important for various asylum claims and sometimes overlap, but for this discussion, the focus will be on membership in a particular social group.

### C. *Membership in a Particular Social Group*

“Membership in a particular social group” was a phrase added as an “afterthought” to the definition of refugee while the 1951 Convention was being considered.<sup>63</sup> A representative from Sweden proposed this language since “experience has shown that certain refugees had been persecuted because they belonged to particular social groups.”<sup>64</sup> The language was adopted as an avenue to persons who would otherwise not be provided protection by the newly formed refugee law.<sup>65</sup>

A four-part test determining a particular social group claim was developed to help interpret what qualified as a particular social group.<sup>66</sup> Components of the test were that the applicant must (1) identify a cognizable social group; (2) prove that the applicant is a group member; (3) prove that the persecution is aimed at one of the group’s unifying characteristics; and (4) show “special circumstances” that merit the recognition of a group-based claim.<sup>67</sup> The first social group to be denied under the test included “young, urban, working class males” in El Salvador.<sup>68</sup> The court

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60. See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984) (“We now reverse and hold that an alien must establish a clear probability of persecution to avoid deportation under § 243(h) [of the Immigration and Nationality Act].”); see also 8 U.S.C. § 1231(b)(3) (2006) (stating that aliens should not be removed by the Attorney General if their lives have been threatened in their country of origin because of their “race, religion, nationality, membership in a particular social group, or political opinion”).

61. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 4 (Paul T. Lufkin ed., 3d ed. 1999).

62. Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

63. THOMAS ALEXANDER ALIENIKOF ET AL., *IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY* 906 (6th ed. 2008).

64. *Id.*

65. See generally *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993) (“Employing the doctrine of *ejusdem generis*, the Board then reasoned that a particular social group refers to “a group of persons all of whom share a common, immutable characteristic.”).

66. See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1574-75 (9th Cir. 1986); see also *Rivera-Castaneda v. INS*, 6 F. App’x. 604, 605 (9th Cir. 2001).

67. *Sanchez-Trujillo*, 801 F.2d at 1576-77.

68. *Id.* at 1575.

that created this test also held that “the phrase ‘*particular social group*’ implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”<sup>69</sup>

Later, membership in a particular social group was elaborated on in *In re Acosta*.<sup>70</sup> The focus shifted from a “voluntary association” to what the BIA construed as a finding that all persons who belonged to a protected group shared a “common immutable characteristic.”<sup>71</sup> Asylum would only be granted by the BIA if the persecution was aimed at the “common immutable characteristic,” one that “should not be required to change because it is fundamental to their individual identities or consciences.”<sup>72</sup> Most federal appellate courts have adopted this construction.<sup>73</sup> Gender and sex are also considered immutable characteristics. Gender, however, is successfully used when it is only part of the social group characteristic.<sup>74</sup> In *Acosta*, the Board mentioned sex as an innate characteristic that could link the members of a social group.<sup>75</sup>

#### D. *Female Genital Mutilation as Persecution and Past Persecution*

Now discussion turns to how FGM has been handled in the realm of asylum law. FGM is gender persecution where the claimants typically use

69. *Id.* at 1576.

70. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (interpreting the phrase “membership in a particular social group”). The phrase was interpreted as the following:

[P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or landownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. *Id.*

71. *Id.* (discussing the elements of common immutable characteristics). “We find the well-established doctrine of *eiusdem generis*, meaning literally, ‘of the same kind,’ to be most helpful in construing the phrase ‘membership in a particular social group.’” *Id.*

72. *Id.*

73. *See, e.g.,* *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *see also* *Castellano-Chacon v. INS*, 341 F.3d 533, 546–48 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Thomas v. Gonzalez*, 409 F.3d 1177, 87 (9th Cir. 2005) (holding that a family could constitute a membership in a particular social group).

74. *See e.g.,* *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (“Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”).

75. *In re Acosta*, 19 I. & N. at 233 (listing “sex” as one of the factors that could be considered as a shared characteristic of a persecuted group).

“membership in a particular social group” as the protected ground.<sup>76</sup> Decision makers, such as immigration judges, federal courts and the BIA, strive to properly employ the definition of refugee, while many times becoming fixated on the other necessary elements, such as what constitutes persecution, rather than establishing if and how the applicant belongs to a particular social group.<sup>77</sup> Most recently, the issue of whether FGM, as past persecution, is a basis for relief has been highlighted by stances taken by the BIA, the federal circuits and the United States Attorney General.<sup>78</sup> The reasoning by all three bodies sets the stage for the future while highlighting the complexities and difficulties of the law.

*In re Kasinga*<sup>79</sup> set the initial precedent for how a woman can establish her social group.<sup>80</sup> Generally, an applicant who fears undergoing FGM describes herself as a woman with a tribal membership to meet the requirement of membership in a particular social group.<sup>81</sup> The BIA in *In re Kasinga* granted the applicant asylum based on defining her social group as one constituting “young women of the Tchamba-Kunsuntu tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>82</sup> Stated simply, the holding applied to women who had not undergone any FGM procedure and who were also members of a tribe. “In accordance with *Acosta*, the particular social group is defined by common characteristics that . . . either cannot change, or should not be required to change because such characteristics are fundamental to their individual

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76. See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 388 (Paul T. Lufkin ed., 3d ed. 1999) (“[G]ender-based claims by women may require analysis under the particular social group ground.”).

77. See *In re A-T-*, 24 I. & N. Dec. 617, 621 (A.G. 2008) (analyzing how the lower courts look at the issue of persecution and finding that the argument based on the false premise that FGM can only occur one time skews the court’s basis for finding a lack of threat of future persecution).

78. See *id.* (finding that the denial of asylum for a woman who underwent FGM in her home country was flawed); *Bah v. Mukasey*, 529 F.3d 99, 101 (2d Cir. 2008) (“Petitioners, three women from Guinea who underwent female genital mutilation in the past, petition for review of decisions of the Board of Immigration Appeals (‘BIA’) affirming, *inter alia*, the denial of their claims for withholding of removal and Convention Against Torture (‘CAT’) relief based on female genital mutilation.”); *Mohammed v. Gonzalez*, 400 F.3d 785, 794 (9th Cir. 2005) (considering whether the failure of petitioner’s counsel to raise claim of FGM affected the outcome of the proceedings).

79. 21 I. & N. Dec. 357 (B.I.A. 1996).

80. *In re Kasinga*, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996) (holding that FGM can be a basis for asylum).

81. See *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2007) (explaining that female members of a tribe would be a social group applying the definition of social group defined in *Acosta*). The focus of the claim should be whether the members of the group are likely to be persecuted “on account of” membership with the group. *Id.*

82. *In re Kasinga*, 21 I. & N. at 365.

identities.”<sup>83</sup> In this case, having “intact genitalia is one [characteristic] that is so fundamental to the individual identity of a young woman that she should not be required to change it.”<sup>84</sup> Thus, the BIA seemed to require a particular social group consist of “(1) women (2) who personally opposed FGM, (3) did not undergo FGM, and (4) who belonged to a particular tribe that (5) practiced FGM.”<sup>85</sup> However, most courts rely heavily on gender combined with nationality or tribal affiliation to define a social group.<sup>86</sup>

Background on the other conflicts pertaining to FGM claims must be explained to understand the most recent developments. Further examination of case law shows the marked split between the federal courts and the BIA when addressing FGM as past persecution.<sup>87</sup> This controversy does not involve any of the protected grounds as much as it begins to focus on the other elements of the refugee/asylum definition. The leading federal appellate case on the treatment of FGM as past persecution is *Mohammed v. Gonzales*.<sup>88</sup> The asylum applicant in this case was a woman from Somalia who had already been inflicted with FGM.<sup>89</sup> Again, her gender combined with her specific clan satisfied her membership in particular social group. According to the BIA, the woman, however, had not established a well-founded fear of future persecution.<sup>90</sup> In order to show well-founded fear there must be (1) a past incident that rises to the level of persecution (2) that is on the account of race, religion, nationality, membership in a social group, or political opinion, and is (3) commit-

83. *Id.* at 366 (acknowledging that being a “young woman” and also a member of a particular tribe could not be changed)

84. *Id.*

85. Yule Kim, *Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?* 14 (Cong. Research Serv., CRS Report for Congress, Order Code RL345878, Oct. 10, 2008), available at [http://assets.opencrs.com/rpts/RL34587\\_20081010.pdf](http://assets.opencrs.com/rpts/RL34587_20081010.pdf) (explaining the BIA’s interpretation of the class of women who based asylum claims on FGM).

86. See *In re Kasinga*, 21 I. & N. at 365 (setting the precedent for a female member of a tribe opposed to the practice of FGM constituting a social group).

87. Yule Kim, *Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?* (Cong. Research Serv., CRS Report for Congress, Order Code RL345878, Oct. 10, 2008), available at [http://assets.opencrs.com/rpts/RL34587\\_20081010.pdf](http://assets.opencrs.com/rpts/RL34587_20081010.pdf) (explaining the split between the BIA and the federal courts regarding whether FGM can occur repeatedly or just once).

88. *Mohammed v. Gonzalez*, 400 F.3d 785, 794 (9th Cir. 2005) (“[T]he question before us is whether first counsel’s failure to present evidence of Mohamed’s past genital mutilation ‘may have affected the outcome of the proceedings.’”).

89. *Id.* (acknowledging that the petitioner’s FGM was “supported by documentary evidence—medical evidence of her genital mutilation”).

90. *Id.* at 799 (arguing that the Mohammed had undergone FGM and therefore had no chance that she would be “personally tortured by the procedure” in the future).

ted by the government or by forces the government is either unable or unwilling to control.<sup>91</sup> The government can rebut a claim if it can show there “has been a fundamental change in circumstances” so that the applicant no longer has either a well-founded fear in the asylum context or a clear probability of persecution in the withholding of removal context.<sup>92</sup>

In *Mohammed*, the woman’s claim of FGM satisfied that she had suffered from past persecution, which warranted a presumption that she had a well-founded fear of future persecution.<sup>93</sup> The government, however, argued that past infliction of FGM was a fundamental change in the circumstances which should have rebutted the presumption of future persecution.<sup>94</sup> In other words, having suffered FGM, the applicant would not be inflicted with the procedure in the future.<sup>95</sup> The Ninth Circuit Court of Appeals rejected the government’s argument.<sup>96</sup> Instead, the court analogized FGM to forced sterilization.<sup>97</sup> Forced sterilization is classified

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91. *Navas v. INS*, 217 F.3d 646, 655–656 (9th Cir. 2000).

92. 8 C.F.R. § 208.13(b)(1)(i)(A) (2003) (stating that a discretionary denial is appropriate when, supported by the preponderance of the evidence, “[t]here has been a fundamental change in circumstances”); 8 C.F.R. § 1208.16(b)(1)(i)(A) (2000) (stating that a presumption that an applicant’s life would be threatened in the future could be rebutted if it is found “[t]here has been a fundamental change in circumstances such that the applicant’s life or freedom would not be threatened”).

93. *Mohammed*, 400 F.3d at 798 (“Once a petitioner demonstrates past persecution within the definition of the Act, she is entitled to a presumption of a well-founded fear of future persecution.”).

94. *Id.* (arguing that because Mohammed has already suffered FGM, she is ineligible for asylum because there was no chance of future persecution).

95. *Id.* (“[T]here is no chance that she would be personally tortured again by the procedure.” (quoting *Oforji v. Ashcroft*, 354 F.3d 609, 615 (7th Cir. 2003))).

96. *Id.* (“The government’s position is not supported by either the BIA’s precedent or our own opinions in analogous circumstances.”).

97. *Id.* at 799.

[P]ersecution in the form of female genital mutilation is similar to forced sterilization and, like that other persecutory technique, must be considered a continuing harm that renders a petitioner eligible for asylum, without more. That is, the individual who endures sterilization does not need to have a fear of the same persecution recurring in the future in order to be eligible for withholding of removal. Rather, we have held that forced sterilization “should not be viewed as a discrete, onetime act, comparable to a term in prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life. . . .” “[S]uch a permanent and continuing form of persecution requires a special result under the asylum regulations, namely that applicants who have suffered forced or involuntary sterilization necessarily have an inherent well-founded fear of future persecution because such persons will be persecuted for the remainder of their lives.” *Id.* (Internal citations and quotations removed).

as a continuing impairment that renders an individual eligible for withholding of removal, without more.<sup>98</sup>

In a subsequent case, *Hassan v. Gonzales*,<sup>99</sup> the Eighth Circuit Court of Appeals agreed with the Ninth Circuit, except that it left the presumption of future persecution rebuttable even though the court believed FGM inflicted in the past was sufficient to create a presumption of a well-founded fear of persecution.<sup>100</sup> The court found that even though the risk of future FGM is slight, that does not negate the possibility that the applicant could suffer from other forms of persecution.<sup>101</sup> In essence, this case holds that past infliction of FGM does not create a fundamental change in the circumstances. The BIA disagrees with theories that FGM could be a continuing harm.<sup>102</sup> Obviously the split in the courts did not occur due to disagreement with what constituted membership in a particular social group; the conflict surrounded how and when FGM rises to the level of persecution to satisfy as an asylum claim.<sup>103</sup> What seemed to settle the idea that gender combined with clan or tribal affiliation fulfilled the protected ground requirement to provide relief did not clear up the controversy surrounding this type of asylum claim.<sup>104</sup> Both issues—addressing what satisfies membership in a particular social group and determining if FGM warrants past persecution without changing circumstances—came to a head just before the Attorney General intervened.

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98. See *Qili Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (characterizing forced sterilization as a form of permanent and continuous persecution which creates an irrebuttable presumption of a well-founded fear of persecution).

Involuntary sterilization irrevocably strips persons of one of the important liberties we possess as humans: our reproductive freedom. Therefore, one who has suffered involuntary sterilization, either directly or because of the sterilization of a spouse, is entitled, without more, to withholding of removal. *Id.*

99. 484 F.3d 513 (8th Cir. 2007).

100. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (“Hassan’s establishment of past persecution creates a presumption that she also possesses a well-founded fear of future persecution.”)

101. *Id.* (explaining the error in the government’s argument where FGM is the only potential form of persecution at risk for the petitioner).

102. See *id.* at 518–19 (indicating that an FGM victim might be eligible for asylum but not based on the threat of a future FGM, or for the threat of an FGM procedure on her daughter, but rather on some other persecution faced by the individual).

103. See *id.* at 518 (agreeing with sister courts that FGM procedures are categorized as persecution).

104. See *Mohammed*, 400 F.3d at 795 (acknowledging that FGM implicates fears of future persecution).



### E. Recent Developments in FGM-Based Cases

In *In re A-T-*, the BIA upheld an immigration judge who denied an applicant's request for withholding of removal<sup>105</sup> because essentially the BIA assumed that the respondent from Mali was a member of a social group but "the respondent failed to present evidence that it is more likely than not that she would be tortured if she returned to Mali."<sup>106</sup> The BIA held that the past infliction of FGM was by itself a "fundamental change in the circumstances" that rebutted the regulatory presumption of future harm.<sup>107</sup> Thus, the BIA rejected the applicant's argument that FGM qualified as "continuing persecution" to qualify her as a refugee.<sup>108</sup> A regulation was cited by the BIA which states that "[i]f the applicant's fear of future persecution is unrelated to past persecution, the applicant bears the burden of establishing that the fear is well-founded."<sup>109</sup> Summarily, there must be a showing of past persecution to create a well-founded fear of *identical* future persecution.<sup>110</sup> Therefore, the analysis of the regulation was that the removal of female genitalia can only be performed once, and consequently, the "very act of persecution itself effects a fundamental change in circumstances that negates the possibility of future persecution."<sup>111</sup>

The Second Circuit responded to the holding of *In re A-T-*. In *Bah v. Mukasey*, the Second Circuit agreed with the Eighth and Ninth Circuits, "which have previously rejected facets of the reasoning the BIA now advances on this front."<sup>112</sup> The court found that the BIA erred when applying the withholding of removal regulatory framework to FGM claims and that the BIA mischaracterized FGM as a "one-time" act.<sup>113</sup> The court

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105. *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007), *vacated*, 24 I. & N. Dec. 617 (A.G. 2008).

106. *Id.* at 304 (concluding that the applicant did not meet her burden of showing a clear probability that she would be persecuted based on her rejection of an arranged marriage in her home country of Mali).

107. *Id.* at 299.

108. *Id.* at 304.

109. *Id.* (citing 8 C.F.R. § 1208.13(b)(1) (2007))

110. See Yule Kim, *Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?* 19 (Cong. Research Serv., CRS Report for Congress, Order Code RL345878, Oct. 10, 2008), available at [http://assets.opencrs.org/rpts/RL34587\\_20081010.pdf](http://assets.opencrs.org/rpts/RL34587_20081010.pdf) (explaining the BIA's insistence that the future fear be based on identical persecution).

111. *Id.* (explaining the BIA's argument against the idea that "a showing of FGM can create a rebuttable presumption of a well-founded fear of future persecution").

112. *Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) (describing how previous FGM did not show future harm would happen).

113. *Id.* at 114 (showing error in characterizing FGM as a single act, and for disregarding other types of persecution).

explained, "Nothing in the regulation suggests that the future threats to life or freedom must come in the same *form* or be the same *act* as the past persecution."<sup>114</sup> The court noted that the government cannot rely only on showing that "a particular act of persecution suffered by the victim will not recur."<sup>115</sup> Domestic abuse, rape, and sex trafficking were other types of abuse petitioners could face when returning to their country of origin.<sup>116</sup>

Most recently, the BIA provided relief to women who have undergone FGM; however, the relief was based solely on humanitarian grounds. That is how the BIA ruled in *In re S-A-K- & H-A-H*<sup>117</sup> based on precedent from *In re Chen*.<sup>118</sup> In *In re Chen*, the BIA ruled that a past persecution rose to such a severe level to qualify as a basis for asylum.<sup>119</sup> Hearing loss and psychological difficulties were experienced by the respondent after being punished by the Chinese Red Guard.<sup>120</sup> At the time of the respondent's case, though, the Chinese government had altered its abusive policies.<sup>121</sup> However, the BIA held that the past persecution was so severe it satisfied a claim for asylum even though a well-founded fear of future persecution was not established.<sup>122</sup> Thus, the BIA seems to treat FGM claims the same—as a basis for asylum without the well-founded fear component being necessary.<sup>123</sup>

Attorney General Mukasey's response to the BIA's decision in *In re A-T-* exposes the ongoing struggle to ensure membership in a particular

114. *Id.* at 115 (claiming that the statute makes no requirement that future persecution be of the same nature).

115. *Id.* (showing how the inability to be persecuted in one way does not preclude other types of persecution).

116. *Id.* at 116 ("The government in these cases did not even attempt to argue that petitioners would not be subject to forms of persecution other than genital mutilation on account of their membership in particular social groups upon return to Guinea.").

117. *In re S-A-K- & H-A-H-*, 24 I. & N. Dec. 464, 465 (B.I.A. 2008) (sustaining respondent's appeal based on humanitarian grounds in place of a well-founded fear of persecution).

118. 20 I. & N. Dec. 16 (B.I.A. 1989).

119. *In re Chen*, 20 I. & N. Dec. 16, 21 (B.I.A. 1989) (describing how the respondent's family suffered a considerable amount of ill-treatment based on his family's strong religious convictions, which was enough to find him statutorily eligible for asylum).

120. *Id.* at 20 (explaining how the respondent and his family became the target of the Red Guards on account of his father's occupation as a Christian minister).

121. *Id.* at 21 (noting that conditions have dramatically changed since the time of the Cultural Revolution in China).

122. *Id.* at 21.

123. Yule Kim, *Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?* 20, 21–22 (Cong. Research Serv., CRS Report for Congress, Order Code RL345878, Oct. 10, 2008), available at [http://assets.open.crs.com/rpts/RL34587\\_20081010.pdf](http://assets.open.crs.com/rpts/RL34587_20081010.pdf).

social group is met as well as addressing the BIA's flawed reasoning.<sup>124</sup> Attorney General Mukasey issued a "stinging order" in *In re A-T*—in an attempt to prevent immigration authorities from deporting a woman who had undergone FGM from being returned to her home country.<sup>125</sup> The Attorney General's opinion vacated the BIA's decision and remanded it to the BIA for reconsideration.<sup>126</sup> The opinion stated that the BIA erred in applying regulatory framework regarding future harm.<sup>127</sup> Specifically, the opinion argued that if the respondent could demonstrate past persecution because of a protected ground, then she would be entitled to the "mandatory presumption" that her life would be threatened in the future on the basis of her original claim.<sup>128</sup> The opinion hones in on a different aspect of the BIA's flawed reasoning. The law requires that when an alien demonstrates that she suffered past persecution on account of one of the statutory bases, there is a presumption that her life and freedom will be threatened in the future on the "*same statutory ground*."<sup>129</sup> Thus, the original claim is not FGM but rather "persecution on account of membership in a particular (albeit not clearly defined) social group."<sup>130</sup>

The government would then have to show that the changed circumstances stem from the social group rather than show that the same type of persecution would not recur.<sup>131</sup> Last, there is direction given to first decide if the applicant "established persecution on account of membership in a particular social group, rather than assuming it" since that is "funda-

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124. Terry Frieden, *AG: Don't deport genital mutilation victim*, CNN.COM, Sept. 22, 2008, <http://www.cnn.com/2008/WORLD/africa/09/22/genital.mutilation.immigrant/index.html>.

125. See *id.* (reporting on the circumstances surrounding the BIA's order in *In re A-T*).

126. See *In re A-T*-, 24 I. & N. Dec. 617, 621 (A.G. 2008) (vacating and remanding the BIA's decision for reconsideration concerning the woman's eligibility for withholding of removal based on her claim of FGM).

127. *Id.* at 622 ("Given this factual error, there was no basis for the Board's legal conclusion that the past infliction of female genital mutilation by itself rebuts '[a]ny presumption of future [female genital mutilation] persecution.'").

128. *Id.* (stating how the statutory framework should be properly interpreted and applied in this case).

129. *Id.* (stating the presumption that one's future persecution will be the same as that person's past persecution suffered).

130. *Id.* (explaining that the original claim was not FGM persecution, but rather based on the applicant's membership in a particular social group).

131. See *In re A-T*-, 24 I. & N. at 622.

[I]t was the Government's burden to show "that changed conditions obviate[d] the risk to life or freedom related to the original claim"—here, persecution on account of membership in the particular social group—not to show "that the particular act of persecution suffered by the victim in the past will not recur." *Id.* (citing *Bah v. Mukasey*, 529 F.3d 99, 115 (2d Cir. 2008)).

mental to the analysis of which party bears the burden of proof and what that burden is.”<sup>132</sup> Essentially, the Attorney General pointed out that the flaw originated from the Board’s assumption on the issue of the respondent belonging to a particular social group.<sup>133</sup>

### III. LEGAL ANALYSIS I

Women subjected to such inhumane mistreatment such as FGM or other gender-based violence, such as domestic violence, should be granted relief of asylum without having to meet unrealistic and confusing definitions and applications of asylum law. Contention surrounding the application of membership of a particular social group has existed since “social group” was included in the 1951 Convention more than fifty years ago. The Immigration and Nationality Act (INA) did not define the term, although it was intended to be interpreted broadly to include groups of people who should be protected by international refugee laws, but who may not be protected on any other ground.<sup>134</sup> The United Nations High Commissioner for Refugees (UNHCR) defines social group as “persons of similar background[s], habits or social status.”<sup>135</sup> The United States created the law to protect those who cannot protect themselves, except now the decision makers use the protected ground of membership in a particular social group as a means to avoid granting asylum by making the qualification impossible to satisfy—either because of the broadness of the definition that was initially given or due to their own overly narrow interpretations.

#### A. *Reluctant Reliance on Membership in a Particular Social Group*

Membership in a particular social group is seen as the most “elusive” of the five protected grounds.<sup>136</sup> The difference between how “social group” was originally defined and how it is further defined by decision makers demonstrates why certain victimized women groups are having

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132. *Id.* at 624 n.7 (clarifying that immigration courts should determine whether the applicant is a member of a particular social group as opposed to assuming it as the BIA did in this case).

133. *Id.* at 623 (emphasizing this point because in assuming membership in a particular social group, the BIA missed the point on the proper statutory analysis).

134. UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 13 (1992), <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> (defining social group for the purpose of refugees).

135. *Id.*

136. See THOMAS ALEXANDER ALIENIKOF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 897 (6th ed. 2008) (“During the past decade the number of attempts to give meaning to this phrase seems to have increased geometrically.”).

difficulty establishing a social group.<sup>137</sup> The term “social group” was intended to be construed broadly, but continues to be more narrowly defined, thus leaving women unsuccessful establishing their own social group.<sup>138</sup>

Even with most circuit courts having adopted the *In re Acosta* test, which requires that the common characteristic “be one that members of the group cannot change or should not be required to change,”<sup>139</sup> which groups actually qualify and do not qualify illustrate why there is a need for a workable definition or another alternative for victimized women. Some of the groups that qualify as a social group in various other asylum claims include the educated, landowning class of Colombian cattle farmers,<sup>140</sup> former child soldiers,<sup>141</sup> families,<sup>142</sup> persons with disabilities,<sup>143</sup> members of a Somali clan,<sup>144</sup> and homosexuals.<sup>145</sup> Other groups that did not qualify with the facts presented in their respective case are the follow-

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137. See generally DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 379–81 (Paul T. Lufkin ed., 3d ed. 1999).

138. See *id.*; see also Stephanie Kaye Pell, Comment, *Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims*, 20 N.C. J. INT’L L. & COM. REG. 655, 658–59 (1995) (asserting that American courts have “narrowly defined the categories of persecution, such as ‘membership in a particular social group’” to ensure that refugees numbers are controlled in the United States).

139. *In re Acosta*, 19 I. & N. Dec. 211, 214 (B.I.A. 1985) (articulating the test to satisfy membership in particular social group that is currently used today and adopted by the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits).

140. *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005) (“Applying this social group test from *Acosta*, the Orejuelas fall into a distinct social group: the educated, landowning class of cattle farmers targeted by [Revolutionary Armed Forces of Colombia].”).

141. *Ang v. Gonzales*, 430 F.3d 50, 56 (1st Cir. 2005) (allowing for the social group but denying the claim for not showing past persecution or well-founded fear).

142. See *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007) (“The BIA has long recognized that ‘kinship ties’ may form a cognizable shared characteristic for a particular social group.”).

143. *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1189–90 (9th Cir. 2005) (determining “persons with disabilities are precisely the kind of individuals that our asylum law contemplates by the words, ‘particular social group’”), *vacated*, 549 U.S. 801 (2006). The Supreme Court vacated the Ninth Circuit’s decision in light of *Gonzales v. Thomas*, 547 U.S. 183 (2006). *Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006).

144. *In re H-*, 21 I. & N. Dec. 337, 342–43 (B.I.A. 1996) (“The Immigration and Naturalization Service Basic Law Manual on asylum adjudications cites a December 9, 1993, legal opinion of the Office of the INS General Counsel . . . in support of the conclusion that a Somali clan may constitute a ‘particular social group.’”).

145. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990) (holding that service man’s homosexuality was grounds for establishment in a special group and that membership within such group qualified the applicant for asylum).

ing: criminal deportees,<sup>146</sup> Honduran street children,<sup>147</sup> non-criminal drug informants working against the Cali drug cartel,<sup>148</sup> young, attractive Albanian women forced into prostitution,<sup>149</sup> indigenous people comprising a large percentage of the population of disputed area,<sup>150</sup> mentally ill Jamaicans or mentally ill female Jamaicans.<sup>151</sup>

Although these are examples of social groups from various types of asylum claims, comparing the successfully defined groups against the unsuccessfully defined groups illustrates the confusion for gender-based claims as well; these tightly defined groups can exclude a number of mutilated women. There is an unfortunate paradox since a woman has to “show that she was persecuted at least in part on account of” membership in a particular social group.<sup>152</sup> However, a woman could claim that her social group is one of mutilated women, where there is no proof that she was persecuted because she is a member of a group of mutilated women. The Fifth Circuit addressed this paradox explaining that it is an “impossibility” for a woman to be a member of a social group “subjected to FGM prior to the time when she underwent FGM.”<sup>153</sup> The UNHCR instructs that this ground is usually marked by the persecutor’s “confidence in the group’s loyalty . . . or the very existence of the social group as such is held

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146. *Toussaint v. Att’y Gen.*, 455 F.3d 409, 418 (3d Cir. 2006) (concluding that criminal deportees cannot be categorized under a social group under the dictates of the Immigration and Nationality Act); *Elien v. Ashcroft*, 364 F.3d 392, 397 (1st Cir. 2004) (stating that the BIA never intended to apply the term “social group” to individuals who engage in illegal activities).

147. *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (finding that characteristics such as “poverty, homelessness and youth” are too vague to constitute a protected group under the Immigration and Nationality Act).

148. *In re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (holding that respondent did not adequately prove that he was persecuted on account of membership within a particular social group).

149. *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005) (discussing how “sweeping classifications” do not qualify for purposes of asylum).

150. *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (“Indigenous people comprising a large percentage of the population of a disputed area have not been demonstrated to be a ‘social group.’”).

151. *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003) (showing various reasons why the applicant failed to show that she would be “singled out for persecution” based on her inclusion in a particular social group).

152. Valena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 257 (2008).

153. *Kane v. Gonzales*, 123 F. App’x 518, 520 (3d Cir. 2005) (“It is a logical impossibility for Kane to have been a member of the social group of women subjected to FGM prior to the time when she underwent FGM (as a one-week-old infant).”). An asylee must show that the social group she belongs to was the cause of the persecution and that the persecution creates the social group. *Id.*

to be an obstacle”<sup>154</sup> The problem is that the focus is on the perspective of the persecutor, and decision makers are preoccupied on whether internal perspectives of the group members are equally as relevant.<sup>155</sup> This can result in the paradox of the “groups being circularly defined by their common victimization.”<sup>156</sup>

The other side of the paradox, until recently, was that a woman who had already undergone FGM could not successfully be granted asylum based on fearing and being resistant to the practice if she had already been mutilated.<sup>157</sup> Nevertheless, even with the Attorney General clarifying that FGM is not a one-time act,<sup>158</sup> a woman will need to establish that the persecution will continue to be inflicted by the group that initially persecuted her if she is sent back to her country of origin. Why should women who are not victims of FGM be granted asylum while the women who have undergone the persecution be left with no relief? The women all come from communities, tribes or clans that practice FGM. This is a step backwards from the progress made in *In re Kasinga*.

One proposed alternative from this quandary is the use of FGM as political persecution.<sup>159</sup> However, not applying membership in a particular social group may result in distorted interpretations or imprecise analysis.<sup>160</sup> Generally using the protected ground of membership in a particular social group requires the applicant to establish her resistance to FGM along with her membership in the group which has been persecuted.<sup>161</sup> In contrast, using political opinion as the protected group only requires showing the woman’s opinion and resistance so that she opposes

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154. UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1992), <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> (noting why membership in a particular social group is often tied to persecution from a government source).

155. See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 378 (Paul T. Lufkin ed., 3d ed. 1999).

156. *Id.*

157. See *In re A–T–*, 24 I. & N. Dec. 296, 301 (B.I.A. 2007) (“[T]here is no separate statutory ground of persecution predicated on an alien’s being subjected to FGM.”).

158. See *id.* at 621 (“As several courts have recognized, female genital mutilation is indeed capable of repetition.”).

159. See Valena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 259 (2008) (“A woman’s opposition to FGM, as well as her resistance to social control, means mutilating her against her will qualifies as persecution.”).

160. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 381 (Paul T. Lufkin ed., 3d ed. 1999).

161. *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (“[T]he applicant must establish that her well-founded fear of persecution is ‘on account of’ one of the five grounds specified in the Act, here, her membership in a ‘particular social group.’”).

the practice of FGM and was persecuted because of that opposition.<sup>162</sup> However, this is imprecise because women are not solely persecuted because they oppose FGM; instead, there are generally additional cultural and traditional reasons that serve as the impetus for inflicting FGM.<sup>163</sup>

### B. *Social Group Conflict and Other Gender-Based Claims*

FGM claims are not the only type of asylum claims where there is difficulty establishing the social group; victims of domestic violence share the same quandary.<sup>164</sup> FGM and domestic violence claims are both considered gender-based, and examining the domestic violence-based claim that has garnered much attention from the asylum community reveals not only the unfortunate substantive history but also the procedural history.<sup>165</sup> Hopefully FGM claims may be resolved more effectively and efficiently.

For example, victims of domestic violence strive to define their social group while incorporating gender, as shown in *In re R-A-*.<sup>166</sup> Unlike claims with FGM, involving persecution inflicted on a social group which has been defined by gender and tribe, domestic violence claims do not have the same sort of precedent. The claimant in *In re R-A-* was a Guatemalan asylum seeker who was a victim of severe domestic violence.<sup>167</sup> The immigration judge granted asylum finding spousal abuse was on account of the applicant's gender-defined social group, as well as her politi-

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162. See Valena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 259 (2008) ("To establish persecution based on political opinion, the applicant must specify her political opinion, and show that she holds that opinion."). Political opinion has a broad interpretation including the treatment and status of women on account of their country of origin, culture, or social or religious groups. *Id.*

163. See WORLD HEALTH ORG., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 9–14 (2008), [http://www.who.int/reproductive-health/publications/fgm/fgm\\_statement\\_2008.pdf](http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf).

164. See *In re R-A-*, 22 I. & N. Dec. 906, 907 (B.I.A. 1999) ("The question before us is whether the respondent qualifies as a 'refugee' as a result of the heinous abuse she suffered and still fears from her husband in Guatemala.").

165. See *In re R-A-*, 24 I. & N. Dec. 629, 630 (A.G. 2008) (discussing the extended case history of woman, a victim of domestic violence, who had been denied a claim for asylum though she claimed she claimed persecution based on membership on a particular social group). There was a stay issued by then-Attorney General Janet Reno in 2001 and the stay was finally lifted and remanded in 2008. *Id.* at 629.

166. 22 I. & N. Dec. 906, 907 (B.I.A. 1999) ("Specifically, we address whether the repeated spouse abuse inflicted on the respondent makes her eligible for asylum as an alien who has been persecuted on account of her membership in a particular social group or her political opinion.").

167. *Id.* ("The respondent testified that her husband 'always mistreated me from the moment we were married, he was always . . . aggressive.'").



cal opinion.<sup>168</sup> Her social group was “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>169</sup> On appeal, the BIA reversed the ruling because marital status, gender, and nationality are not acceptable as a social group nexus recognized as “a societal faction” and that the group was only recognized in the abstract.<sup>170</sup> The BIA honed in on the idea of gender being too broad of a category and compared that defining category with others also seen as too broad without ever explaining or proposing what can satisfy a “social group.”<sup>171</sup>

In 2001, then-Attorney General Janet Reno vacated the BIA’s decision in *In re R-A-* which led to a twisted procedural history where eventually Department of Homeland Security (DHS) asked Attorney General Reno to issue a decision instructing the BIA to grant the respondent asylum without an opinion.<sup>172</sup> Otherwise, Reno could have postponed deciding until DHS issued final regulations that would govern domestic violence asylum cases.<sup>173</sup> That was the option she chose, however, as the regulations were never finalized.<sup>174</sup> Seven years passed without a response on *In re R-A-*. Although different persecution was inflicted, establishing a social group in both cases remain questionable.

On September 28, 2008, Attorney General Mukasey certified *In re R-A-* to himself, explaining that decisions issued in the interim by the BIA may be able to help finally decide *In re R-A-*.<sup>175</sup> Essentially, his certification overruled the decision of prior Attorney Generals John Ashcroft and Janet Reno, both of whom were awaiting the finalization of the regulations the Justice Department proposed.<sup>176</sup> What the Justice De-

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168. *Id.*

169. *Id.*

170. *Id.* (“The respondent in this case has not demonstrated that domestic violence is as pervasive in Guatemala as FGM is among the Tchamba-Kunsuntu Tribe, or, more importantly, that domestic violence is a practice encouraged and viewed as societally important in Guatemala.”).

171. See *In re R-A-*, 22 I. & N. at 907 (“Initially, we find that ‘Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination’ is not a particular social group.”).

172. See ANWEN HUGHES, ASYLUM AND WITHHOLDING OF REMOVAL—A BRIEF OVERVIEW OF THE SUBSTANTIVE LAW 293, 308 (Practicing Law Inst. 2005).

173. See *id.* at 308–09.

174. See generally *In re R-A-*, 22 I. & N. at 906 (directing the BIA to stay reconsideration of the its earlier decision)

175. *In re R-A-*, 24 I. & N. Dec. 629, 631 (A.G. 2008) (“In light of these developments and the fact that the proposed rule cited by Attorney General Reno never has been made final, I have decided to lift the stay so that the Board can revisit the issues in *In re R-A-* and related cases and issue new decisions.”).

176. See Press Release, Ctr. for Gender and Refugee Studies, Univ. of Cal., Hastings Coll. of Law, New Ruling by Attorney General Mukasey May Endanger Rights of Women

partment Regulations would have amended are the asylum regulations "relating to the meaning of the terms, 'persecution,' 'on account of,' and 'particular social group.'"<sup>177</sup> In the meantime, numerous court decisions have been issued addressing various aspects of this area of asylum law.<sup>178</sup> Attorney General Mukasey reasons that the BIA should proceed in its reconsideration of *In re R-A-* and related cases.<sup>179</sup> Whatever the BIA decides in both *In re A-T-* and *In re R-A-* can set the precedent because administrative decisions interpreting statutes are given deference by federal appellate courts.<sup>180</sup>

In the meantime, immigration judges granted asylum to women fleeing domestic violence. For instance, a Muslim woman from Morocco was granted relief after she was abused by her father due to her religious beliefs that differed from his own beliefs.<sup>181</sup> This case shows there are arguably other grounds to use when the claimant's construction of membership in a particular social group is not meaningful enough. But, the asylum seekers should not have to wait years for their claims to be adjudicated, nor should they have to struggle when making their claims because the law is inadequate and unclear in crucial areas.

Obstacles mount with gender-based claims because there is not always a clear-cut method to approach them. The BIA must address the tension in the law by applying the social group term using enough flexibility to protect applicants with gender-based claims, although not too much so as to extend the definition to a point which forces the social group to become meaningless as a protected ground. In *In re Kasinga*, the BIA makes clear that "gender-based, or gender-related, asylum claims within the 'membership in a particular social group' construct" is entirely appro-

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Asylum Seekers (Oct. 2008), available at [http://cgrs.uchastings.edu/documents/media/press%20release/R-A-Mukasey\\_press\\_release\\_oct\\_08.pdf](http://cgrs.uchastings.edu/documents/media/press%20release/R-A-Mukasey_press_release_oct_08.pdf) (detailing the certification of asylum for *In re R-A-*).

177. See generally Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (defining terms needed to establish an asylum claim).

178. See *In re R-A-*, 24 I. & N. at 630 ("[I]ntervening decisions may not have directly resolved the issues presented in *In re R-A-*, some of them have addressed, for example, the terms 'persecution,' 'on account of,' and 'particular social group,' and thus may have relevance to the issues presented with respect to asylum claims based on domestic violence.").

179. See *id.* (explaining that the BIA should address not only this case but the numerous other cases that involve claims of domestic violence in applicants' home countries).

180. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (stressing the courts' adherence to the "principle of deference to administrative interpretations").

181. *In re S-A-*, 22 I. & N. Dec. 1328, 1329 (B.I.A. 2000) (finding that the woman suffered persecution because of her religious beliefs, which differed from the beliefs held by her father).

priate in American jurisprudence.<sup>182</sup> Although sex is seen as a “sort of shared characteristic that could define a particular social group,”<sup>183</sup> reluctance stems from sex being too broad of a category.<sup>184</sup> However, recognizing only gender in some circumstances can be essential in order to provide women the same access to relief and protection while avoiding general interpretive distortions of the refugee definition.<sup>185</sup>

### C. *Rethinking Social Group as Applied to FGM Victims*

Recognizing that women who undergo FGM normally face various other types of persecution such as rape, forced marriage, honor killings, and physical and mental abuse is necessary to approach defining membership in a particular social group for FGM victims. FGM not being a “one-time” act has been rectified.<sup>186</sup> FGM persecution is often interconnected with other harms.<sup>187</sup> Therefore, decision makers should appreciate that women who have “one act of gender-related violence” inflicted upon them also have “related violence within a spectrum of harms” able to be inflicted upon them from that same culture.<sup>188</sup> What has been established is that FGM victims do not qualify as a specific social group solely based on gender.<sup>189</sup> This is the same for women who are seeking asylum based on having been a victim of domestic violence.<sup>190</sup> Gender as particular social group may be too broad into order to meet that criterion.

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182. *In re Kasinga*, 21 I. & N. Dec. 357, 377 (B.I.A. 1996).

183. DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 388–89 (Paul T. Lufkin ed., 3d ed. 1999).

184. *Id.* at 389.

185. *Id.* at 388–89.

186. *See In re A–T–*, 24 I. & N. Dec. 617, 621 (B.I.A. 2008) (clarifying that FGM is not a one-time act).

187. *See* Valena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 263–66 (2008) (“Once a woman can claim she suffered FGM as persecution because she is a woman in a specific culture, she will have the opportunity to make a claim that she faces future persecution on the same basis, for example, forced prostitution, forced marriage, further genital mutilation, or economic persecution.”).

188. *Id.* at 263 (describing how courts should recognize the connection between genital mutilation and other types of persecution a women from a culture can have inflicted upon her).

189. *See Asad v. Ashcroft*, 135 F. App’x 839, 845 (6th Cir. 2005) (holding an applicant cannot claim that gender combined with ability to find work satisfies a well-founded fear of persecution); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (explaining that gender alone does not warrant asylum based on classification with a particular social group).

190. *See In re R–A–*, 22 I. & N. Dec. 906, 907 (B.I.A. 1999) (“[T]he respondent has not shown that ‘Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination’ is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala.”).

However, there must be a middle ground, or some defined criteria for women who are persecuted in their particular culture. Many scholars have argued that if gender alone satisfied membership of a particular social group, then other future harms such as forced marriage, rape, domestic violence and child marriage should be understood since those broader harms related to gender could be associated with one another.<sup>191</sup> In other words, the harms are “on account of” membership in that particular social group.

Those broader harms related to gender can be understood as an interconnection of harms, which moves towards a mixed motive approach for granting asylum.<sup>192</sup> Case law established the idea that there is a nexus (or connection) between the persecution and the protected ground that must be proven.<sup>193</sup> The difficulty is that “on account of” is vague, as the definition evolved from the United Nations Convention Relating to the Status of Refugees. However, there the term “for reasons of” was used.<sup>194</sup> Later, the Supreme Court defined “on account of” as “because of.”<sup>195</sup> Despite the imprecision of the term, what is clear is that a relationship must exist between the persecution and the protected ground. That is what is referred to as the nexus.<sup>196</sup> Case law has also construed “membership in a particular social group” to mean “common immutable characteristic.”<sup>197</sup> The idea of the nexus is the crux of where most of the

191. See Valena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 264–65 (2008) (examining the possible outcome if gender alone became an acceptable basis for an asylum claim). “If gender is openly recognized as a basis for asylum claims . . . then a broader range of harms against women, such as domestic violence, forced marriage, child marriage, rape, sexual slavery, and mutilation, can be understood as interconnected.” *Id.*

192. See *id.* (stating that courts should treat FGM in the same manner in which they treat other asylum claims, “by looking at the basis of the harm, and the interconnection of the present harm to different potential future harms”)

193. See generally *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (holding that in the instant case the victim did not qualify for asylum because the persecution was occurring because of the persecutor’s political opinion and not because of the victim’s political opinion).

194. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

195. *Elias-Zacarias*, 502 U.S. at 483 (reasoning that Elias-Zacarias had to establish guerillas would persecute him *because of* his political opinion).

196. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 268 (Paul T. Lufkin ed., 3d ed. 1999) (“There must be a causal link between the existence of the risk and the person’s protected status or belief.”).

197. See *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (describing an immutable characteristic as one “that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to change”).

decisions differ.<sup>198</sup> Without a middle ground, those who deserve protection are not granted it; this may then add to the numbers of illegal immigrants in the country or to the countless women who are subjected to the continuing persecution in their country of origin simply because the laws are too vague and misconstrued to serve their true purpose.<sup>199</sup> The following analysis will examine specific reasoning and aspects of the immigration community's approach toward defining "social group" for victims of FGM. It will also propose new solutions in case any future BIA precedent does not adequately resolve this ongoing tension in the law.

#### IV. LEGAL ANALYSIS II

Earlier discussion explains that whatever the BIA concludes when revisiting its decision in *In re A-T-*, is it likely FGM victims may still not receive protection or proper guidance. An alternative is for Congress to provide protection through legislation as they did for persons who feared or underwent coercive population control practices.<sup>200</sup> Various reasons supporting this alternative will be examined in the remainder of the Comment to show why and how this may be a more practical approach.

##### A. *The Political Nature of the Board of Immigration Appeals*

Even though the BIA, as an administrative body, is given deference does not necessarily mean that the Board's conclusion will provide the best precedent; this is due to the political nature of the body.<sup>201</sup> The way the

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198. See generally DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 268–69 (Paul T. Lufkin ed., 3d ed. 1999).

199. See Shannon Nicholas, *American Mutilation: The Effects of Gender-Biased Asylum Laws on the World's Women*, 6 KAN. J.L. & PUB. POL'Y 42, 45 (1997) ("[T]he vague language defining a 'refugee' under the current asylum law has created inconsistent and unpredictable judgments.").

200. See 8 U.S.C. § 1101(a)(42)(B) (2000).

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion. *Id.*

Cf. *De You Chen v. INS*, 95 F.3d 801, 806 (9th Cir. 1996) (denying an application for asylum because China's family planning policies do not constitute a ground for political asylum).

201. See, e.g., Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 433 (2007) ("At the court of appeals level, the Asylum Study found that judges appointed by Democrats appear to vote in favor of asylum applicants at much higher rates than do judges appointed by Republicans.").

BIA operates is important since the appointments are political ones controlled by the United States Attorney General.<sup>202</sup> The BIA is a nonstatutory body created by the Attorney General comprised of fifteen members.<sup>203</sup> The Attorney General has authority to review the BIA decisions, but exercises it sparingly.<sup>204</sup> In 2002 and 2003, the Attorney General attempted to streamline the BIA to reduce the backlog.<sup>205</sup> In the past, a three-member panel wrote opinions.<sup>206</sup> Now, most decisions are made by a single person without a written opinion.<sup>207</sup> Then-Attorney General John Ashcroft also reassigned five of the original twenty-three BIA members.<sup>208</sup> Subsequent resignations and vacancies account for the current number of fifteen.<sup>209</sup> An empirical study shows that the members reassigned have a more favorable record toward noncitizens.<sup>210</sup> The make up of the BIA can and will change based on the political climate and the make up of the Executive branch.<sup>211</sup>

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202. See *id.* at 418–20 (“Although the ideology-based purge has obvious implications for the decisional independence of the BIA, the tone and the broad language of the new regulations has left the future decisional independence of the immigration judges in similar doubt.”).

203. Department of Justice, Board of Immigration Appeals Fact Sheet, [www.usdoj.gov/eoir/fs/biabios.htm](http://www.usdoj.gov/eoir/fs/biabios.htm) (last visited May 20, 2009) (stating that the BIA is the highest administrative body charged with implementing and interpreting the United States immigration laws). The BIA is comprised of fifteen members including a Chairman and Vice Chairman. *Id.*

204. See Terry Frieden, *AG: Don't Deport Genital Mutilation Victim*, CNN.COM, Sept. 22, 2008, <http://www.cnn.com/2008/WORLD/africa/09/22/genital.mutilation.immigrant/index.html> (explaining that the Attorney General has only offered an opinion on three immigration cases in the past three years). The immigration courts decide on average 40,000 cases annually. *Id.*

205. See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 418 (2007) (“The most visible changes were those designed to ‘streamline’ the BIA in order to reduce its large backlog of cases.”).

206. See *id.* at 418–19.

207. See *id.* at 418–20 (“The new regulation made single member ‘affirmances without opinion’ (AWOs) the norm, prohibiting three-member panels and reasoned written opinions except in certain designated categories of cases.”).

208. *Id.* (“Approximately one year after this announcement, the Attorney General reassigned five BIA members to either nonadjudicative or lower adjudicative positions within the Justice Department”).

209. See DEP’T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 3 (2009), [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir).

210. See Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. NO. 19, 1156 (Oct. 1, 2004) (“Members inclined to favor the position of noncitizens were particularly vulnerable.”).

211. See generally Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 433 (2007) (discussing the diversity of appointees and how this diversity affects differing outcomes in adjudication of claims).

Besides the composition of the BIA, the professionalism of the BIA was called into question in 2006 by United States Attorney General Alberto Gonzales after various appellate judges berated the behavior of a few immigration judges.<sup>212</sup> The Attorney General responded by reviewing the immigration courts to create a series of steps afterwards aimed at improving the adjudicating process and professionalism of the courts.<sup>213</sup> The comprehensive review was a product of the review which essentially created oversight, and therefore, eroded the adjudicator's independence.<sup>214</sup> This change could be seen as an improvement in the immigration system as well as a warning of a broken system. Either way the adjudicative system is imperfect to a certain degree. The BIA publishes opinions as precedent that show the requirements necessary to establish a successful claim for relief.<sup>215</sup> Unfortunately, the BIA's decisions have been criticized for inconsistency.<sup>216</sup> Asylum claim decisions have sharply divided the Board in recent times.<sup>217</sup> Since the BIA is charged to clarify ambiguity of the protected ground of membership in a particular social group, perhaps it should also be refreshed on the many avenues by which the asylum community has approached the topic. Considering the guidance from the Attorney General as well as taking into account the reasoning of the circuit court decisions pertaining to FGM cases is a practical way to approach defining "social group."

Although the Justice Department Regulations were never issued, the brief written by the U.S. Justice Department for *In re R-A-* breaks down

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212. *Id.* at 420 ("[Attorney General Alberto Gonzales] would not release his review team's findings, but he did announce a series of steps to enhance the professionalism of the adjudicators.").

213. Press Release, Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), *available at* [http://www.usdoj.gov/opa/pr/2006/August/06\\_ag\\_520.html](http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html).

214. *Id.*

215. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 8 (Paul T. Lufkin ed., 3d ed. 1999) ("The Board's approach to address its case law is markedly fact-specific; its decisions only infrequently state the kind of general rule or policy that may be clearly applied to the determination of other similar cases.").

216. See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 447-48 (1992).

217. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 8-9 (Paul T. Lufkin ed., 3d ed. 1999) (describing further that there are various other informal administrative sources that have filled in the gaps in this area of law). Unfortunately, the development of asylum law has often been described as "from the bottom up." *Id.* Immigration judges are credited with issuing thoughtful decisions and there are other manuals that elaborate on the substantive and procedural law where the BIA has not. *Id.*

the elements establishing asylum and should be considered as well.<sup>218</sup> Congress has also voiced concerns over the BIA's decisions on *In re A-T*.<sup>219</sup> Public officials who represent citizens of this country could also be taken into account. Members of the BIA may be the experts on the matter but they should not address this topic without understanding other reasoning besides their own, especially now that their decision has been vacated based on flawed application of their own laws.

### B. "Refugee" Definition to Include Forced Sterilization

Protection to those persons who have undergone or feared undergoing forced sterilization due to coercive population control measures have not always been protected in the United States. For example, in *Chen v. INS*, the Ninth Circuit Court of Appeals affirmed a BIA decision denying asylum to a male Chinese citizen whose sought to avoid persecution on account of China's "one couple, one child policy."<sup>220</sup> The court deferred to the BIA decision pursuant to the principle of administrative deference and held "that the petitioner's refusal to comply with [China's] one child per couple policy did not constitute an expression of political opinion."<sup>221</sup> Chen argued that some decisions had been overruled by subsequent administrative action and also by an Executive Order.<sup>222</sup> Nevertheless, the Ninth Circuit affirmed the denial of the petition. Moreover, the court did not find there was a violation of Chen's human right to procreate as protected under the U.N. Universal Declaration of Human Rights, since a violation of that right is not recognized under the grounds for asylum as listed in the INA.<sup>223</sup> In this case, there was no avenue for relief whatso-

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218. Department of Homeland Security's Position on Respondent's Eligibility for Relief at 5-7, *In re R.A.*, No. A73 753 922 (A.G. Feb. 19, 2004), available at [http://cgrs.uchastings.edu/documents/legal/dhs\\_brief\\_ra.pdf](http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf) (discussing the elements necessary to establish a claim for asylum).

219. See Letter from Olympia J. Snowe & Carl Levin, U.S. Senators, to Michael B. Mukasey, U.S. Attorney General, (Apr. 25, 2008); see also Letter from Chairman John Conyers Jr. and Congresswoman Zoe Lofgren, U.S. House of Representatives Committee of the Judiciary Committee to Michel B. Mukasey, U.S. Attorney General (Sept. 23, 2008), available at <http://lofgren.house.gov/PRArticle.aspx?NewsID=1879>.

220. *De You Chen v. INS*, 95 F.3d 801, 806 (9th Cir. 1996) (denying a application for asylum because China's family planning policies do not constitute a ground for political asylum).

221. *Id.*

222. *Id.* at 802 (detailing Chen's attempt to persuade the court that prior administrative action and an executive order evidence that a prior BIA decision regarding the PRC's family planning policies as a ground for political asylum has been overruled).

223. *Id.* at 806 (indicating that the court believed that Chen failed to show how a denial of the right to procreate could fall under the protected grounds listed in the INA).



ever if someone feared forced sterilization or other population control methods.

This line of thinking abruptly ended in 1996 when legislation altered the definition of refugee to include these individuals who “are deemed to have been persecuted or to have a well-founded fear of persecution on account of their political opinion.”<sup>224</sup> This legislation, the Illegal Immigration Reform and Immigration Responsibility Act<sup>225</sup> (IIRAIRA), is known for the significant revision to U.S. asylum law since the Refugee Act.<sup>226</sup> The amended definition makes it easier for individuals because those who qualify do not have the burden of establishing that they were being persecuted on account of their political opinion,<sup>227</sup> nor must they establish that they have a well-founded fear, since that is not needed under the law. Instead, the law assumes those criteria. Furthermore, spouses of individuals who have been forced to undergo population control procedures have been granted asylum by the BIA and federal courts, although this is not automatic.<sup>228</sup> Qualifying persons are now protected in a comprehensive manner.

### C. Comparing FGM Claims to Forced Sterilization Claims

The BIA suggests that a past infliction of FGM will be granted asylum if Congress directed the Board to do so.<sup>229</sup> The BIA’s opinion in *In re A-T-*, although now vacated and remanded by the Attorney General,

224. See REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 55 (5th ed. 2007) (explaining the revised definition of refugee in IIRAIRA to provide for those who are subject to coercive population control).

225. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Omnibus Consolidated-Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of U.S.C.).

226. See REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 12 (5th ed. 2007) (discussing the new provisions included in IIRAIRA).

227. Immigration and Nationality Act § 101(a)(42)(B); 8 U.S.C. §1101(a)(42)(B) (2006).

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion. *Id.*

228. See *Qili Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (granting asylum to the applicant based on his wife having been forcibly sterilized by Chinese authorities).

229. See *In re Y-T-L-*, 23 I. & N. Dec. 601, 606–08 (B.I.A. 2003) (“It is manifestly clear that Congress intended to make eligible for asylum those who were victims of China’s coercive family planning policy . . .”).

addresses the comparison of FGM to forced sterilization made by the Ninth Circuit in *Mohammed v. Gonzales*.<sup>230</sup> In *In re Y-T-L*,<sup>231</sup> which is a BIA opinion that granted asylum based on Congress's amended definition of refugee, the BIA explained that forced sterilization and abortion are an exception to what constituted "continuing persecution" since they are singled out in the refugee definition on the strength of the past harm alone.<sup>232</sup> Moreover, the BIA reasoned that holding otherwise would have contradicted Congress's purpose.<sup>233</sup> If Congress gave direction via a statute specifically to the issue of FGM, the BIA would be obligated to apply it without any dilemma. Perhaps Congress intervening would alleviate any further misinterpretation of the regulatory framework when the Board addresses its next task of addressing membership in a particular social group for FGM victims.

#### D. Federal Efforts Made Against Female Genital Mutilation

Legislation allowing for FGM victims to seek asylum would parallel the current viewpoint in United States law and would fall in line with steps already taken by the government. In the United States, female genital mutilation is a punishable offense.<sup>234</sup> The United States outlaws performing FGM on persons less than 18 years of age.<sup>235</sup> Anyone who commits FGM on another person who is under the age of 18 years old will be fined or imprisoned for up to 5 years.<sup>236</sup> An exception allows surgical procedures performed by a licensed medical practitioner for medical purposes or related to child birth.<sup>237</sup> Cultural defenses based on beliefs or

230. *Mohammed v. Gonzales*, 400 F.3d 785, 799–801 (9th Cir. 2005) (recognizing FGM persecution claims as similar to sterilization persecution claims).

231. 23 I. & N. Dec. 601 (B.I.A. 2003).

232. *In re Y-T-L*, 23 I. & N. Dec. 601, 605–06 (B.I.A. 2003) (noting that the respondent has no reason to fear this form of persecution based on the fact that he has already been persecuted, but also realizing the "special nature" of the persecution at issue).

233. *Id.* at 607–08 (discussing the intent of Congress "regarding the eligibility for asylum of past victims of coercive family planning practices"); see 8 C.F.R. § 1208.13(b)(1)(i)(A) (1997) (defining discretionary referral or denial of asylum claims based on a fundamental change in circumstances of the applicant).

234. 18 U.S.C. § 116 (2006) (listing penalties for engaging in any act constituting female genital mutilation upon a minor).

235. *Id.* (imposing a fine or imprisonment or both for engaging in female genital mutilation of a minor).

236. *Id.*

Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both. *Id.*

237. *Id.* § 116(b)(1)–(2).

customs permit no exception.<sup>238</sup> In addition, sixteen states in the United States have adopted laws regarding FGM, most of which were enacted between 1996 and 1999.<sup>239</sup> Those states are California, Colorado, Delaware, Illinois, Maryland, Minnesota, Missouri, Nevada, New York, North Dakota, Oregon, Rhode Island, Tennessee, Texas, West Virginia, and Wisconsin.<sup>240</sup>

Along with those measures, the Department of Health and Human Services (HHS) was directed by provisions in federal law to compile data on the practice of FGM for educational purposes in relevant communities.<sup>241</sup> The data specifically gathered numbers of families in the United States who have been subjected to FGM either in the United States or in another country.<sup>242</sup> It also required data on communities within the United States where the practice is prevalent.<sup>243</sup> HHS then distributed information on how to handle complications due to the procedure.<sup>244</sup> The Centers for Disease Control and Prevention also stated that an esti-

238. *Id.* § 116(c).

239. See CAL. PENAL CODE § 273.4 (West 1996); CAL. HEALTH & SAFETY CODE § 124170 (1996); COLO. REV. STAT. § 18-6-401 (1999); DEL. CODE ANN. tit. 11, § 780 (1996); 720 ILL. COMP. STAT. 5/12-34 (1998); MD. CODE ANN., HEALTH—GEN. I § 20-601 (1998) (making it illegal to perform FGM; to consent to a procedure for a minor; or even to consider custom or ritual as a justification for the practice); MINN. STAT. § 609.2245(1) (1996) (labeling it a crime to perform a female genital mutilation); MO. REV. STAT. § 568.065 (2000) (codifying genital mutilation of a female child as a class B felony); NEV. REV. STAT. § 200.5083 (1997) (spelling out the penalties for mutilating the genitalia of a female child); N.Y. PENAL LAW § 130.85 (McKinney 1997) (using the same language as the Maryland statute, as in making FGM illegal in practice and by parental consent); N.D. CENT. CODE § 12.1-36-01 (1995) (classifying the offense of genital mutilation as “any person who knowingly separates or surgically alters normal, healthy, functioning genital tissue of a female minor”); OR. REV. STAT. § 163.207 (2005); R.I. GEN. LAWS § 11-5-2 (2002); TENN. CODE ANN. § 39-13-110 (1996); TEX. HEALTH & SAFETY CODE ANN. § 167.001 (Vernon 2008); W. VA. CODE ANN. § 61-8D-3a (West 1999) (“[A]ny person who circumcises, excises or infibulates . . . the labia majora, labia minora or clitoris of a female under the age of eighteen . . . shall be guilty of a penalty.”); WIS. STAT. § 146.35 (1995) (“[N]o person may circumcise, excise or infibulate the labia minora or clitoris of a female minor.”).

240. See generally CTR. FOR REPRODUCTIVE RIGHTS, LEGISLATION ON FEMALE GENITAL MUTILATION IN THE UNITED STATES 5–10 (2004), [http://reproductiverights.org/sites/default/files/documents/pub\\_bp\\_fgmlawsusa.pdf](http://reproductiverights.org/sites/default/files/documents/pub_bp_fgmlawsusa.pdf) (listing the various states and their respective legislation relating to FGM).

241. Prison Litigation Reform Act of 1995, Pub. L. 104-134, § 520, 110 Stat. 1321-250 (1996) (stating that the Secretary of Health and Human Services shall compile certain data regarding females in the United States that have undergone FGM).

242. *Id.* § 520(b)(1).

243. *Id.* § 520(b)(2).

244. *Id.*

mated 168,000 females have undergone or are at risk for FGM.<sup>245</sup> A provision in the IIRAIRA enacted in 1996 also directed the Department of State to make available information to aliens in the United States of the harm FGM may cause as well as the legal consequences of performing the procedure in the United States.<sup>246</sup>

In 1997, when Congress passed the Omnibus Appropriations Spending Bill, it included appropriations for many efforts, including FGM.<sup>247</sup> One of the provisions prohibited international financial institutions from providing loans to FGM practicing countries where there was no effort by local governments to educate on preventing the practice.<sup>248</sup> All of these measures taken by both the states and the federal government express a commitment to alleviating the practice in the United States. FGM asylum provisions included in United States law would demonstrate that the United States is truly committed not only to preventing FGM in our country but also providing protection to those already inflicted.

The 100th Congress participated in the ongoing debate surrounding FGM asylum applicants.<sup>249</sup> On January 28, 2008, the House Judiciary Committee Chairman John Conyers (Democrat-Michigan) and committee member Congresswoman Zoe Lofgren (Democrat-California) sent a letter to Attorney General Mukasey addressing their concern about the BIA's recent decision in *In re A-T-* that appears to "reverse U.S. policy regarding the protection of women subjected to severe human rights abuses such as female genital mutilation (FGM)."<sup>250</sup> In addition, Senators Olympia Snowe (Republican-Maine) and Carl Levin (Democrat-Michigan) sent a letter to the Attorney General requesting review of the

245. CTR. FOR REPRODUCTIVE RIGHTS, LEGISLATION ON FEMALE GENITAL MUTILATION IN THE UNITED STATES 4 (2004), [http://www.reproductiverights.org/pdf/pub\\_bp\\_fgmlawsusa.pdf](http://www.reproductiverights.org/pdf/pub_bp_fgmlawsusa.pdf).

246. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Omnibus Consolidated-Appropriations Act for Fiscal Year 1997, Pub. L. 104-208, § 644, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1101).

247. 22 U.S.C. § 262k-2(b) (2006) (opposing any loan or distribution of funds to any government known to practice FGM).

248. See *id.* The legislation lists the financial institutions to include "the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the Asian Development Fund, the African Development Bank, the African Development Fund, the International Monetary Fund, the North American Development Bank, and the European Bank for Reconstruction and Development." *Id.*

249. H.R.J. Res. 32, 110th Cong. (2007) (introducing female genital mutilation as an important human rights issue requiring national attention).

250. Letter from Chairman John Conyers Jr. and Congresswoman Zoe Lofgren, U.S. House of Representatives Committee of the Judiciary Committee, to Michael B. Mukasey, U.S. Attorney General (Sept. 23, 2008) (regarding the Board of Immigration Appeal's decision in *In re A-T-*).

decision since “in essence, the BIA’s reasoning in this case condones the abhorrent practice of performing FGM.”<sup>251</sup> Furthermore, in 2007, the House of Representatives passed a resolution unanimously condemning FGM as a “barbaric practice”<sup>252</sup> and in 2008, the Senate passed a resolution directing funds to the United Nations Population Fund that works to end female genital mutilation.<sup>253</sup> Congress now has the ability to assert its legislative authority by enacting a bill to grant asylum to FGM victims.

While debating the various facets of our immigration policy, FGM provisions may be included in any future reforms. In recent years, both the House and Senate proposed immigration reform measures, but have yet have come to a consensus.<sup>254</sup> Immigration reform remains a concern for all Americans. Handling the undocumented immigrant population garners most debate.<sup>255</sup> Further amending the definition of refugee to include FGM is a practical route to explore. For example, the Immigration and Nationality Act could read:

“For purposes of determinations under this Act, a person who has been forced to undergo [female genital mutilation] or abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion or [member-

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251. Letter from Olympia J. Snowe & Carl Levin, U.S. Senators, to Michael B. Mukasey, U.S. Attorney General, (Apr. 25, 2008) (regarding the Board of Immigration Appeal’s decision in *In re A-T-*).

252. H.R.J. Res. 32, 110th Cong. (2007) (“Denouncing the practices of female genital mutilation, domestic violence, ‘honor’ killings, acid burning, dowry deaths, and other gender-based persecutions and expressing the sense of the House of Representatives that participation, protection, recognition, and independence of women is crucial to achieving a just, moral, and honorable society.”). “The United States should renew consideration of and ratify its signature on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).” *Id.*

253. S. 2682, 110th Cong. (2007) (directing that United States provide funding to the United Nations Population Fund, which “carries out activities in more than 150 countries to reduce maternal mortality and morbidity, end female genital mutilation and cutting, reduce transmission of STIs and HIV/AIDS, and ensure access to health care and essential supplies for women and families impacted by emergencies.”).

254. Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007) (providing legal status and a path to legal citizenship for the approximately 12 million illegal immigrants currently residing in the United States); see Carrie Budoff Brown, *Backroom Immigration Deal Emerges*, POLITICO, May 17, 2007, <http://www.politico.com/news/stories/0507/4066.html> (discussing a bill that would grant legal status to approximately 12 million illegal immigrants in the United States).

255. See generally Carrie Budoff Brown, *Immigration Debate Roils Anew*, POLITICO, Sept. 25, 2007, <http://www.politico.com/news/stories/0907/5996.html> (recognizing that the immigration debate focuses on whether legislative measures are a type of amnesty).

ship in a particular social group], and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion or [membership in a particular social group].”<sup>256</sup>

In fact, a provision limiting the number of FGM victims could be included as to not overwhelm the United States population. Perhaps then the BIA would not face future dilemmas of working outside of its regulatory framework. Moreover, Congress would be taking a stand in support of basic human rights and victims of FGM would be given a protection under the United States asylum law so as to alleviate the obstacles women currently face in other claims based in whole or in part on gender.

## V. CONCLUSION

FGM is usually performed on girls between the ages of 7 and 10 years old.<sup>257</sup> Elder women in the community typically perform the procedure without properly sterilized equipment.<sup>258</sup> There are both immediate and long-term health consequences from the procedure.<sup>259</sup> Initially, there is heavy bleeding that can possibly lead to hemorrhaging. Severe pain lasts for days or weeks. Throughout a lifetime, complications include chronic infections, pain during sexual intercourse, infertility, and problems during pregnancy.<sup>260</sup> Not to mention that some women also have trouble sleeping and disturbance of mood.<sup>261</sup> Customs and traditions, control of a woman’s sexuality, religion, and social pressure are all justifications given by the societies where the practice is prevalent.<sup>262</sup> Communities using customs and tradition as a justification claim that FGM aids in continuing cultural identity.<sup>263</sup> Controlling a woman’s sexuality stems from a desire

256. Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006). For illustrative purposes, I am offering an example of how the wording of the current statute could be amended to provide for protection of an FGM victim.

257. United Nations Population Fund, Frequently Asked Questions on Female Genital Mutilation/Cutting, [www.unfpa.org/gender/practices2.htm#8](http://www.unfpa.org/gender/practices2.htm#8) (last visited May 11, 2009).

258. *Id.* (“FGM[] is usually carried out by elderly people in the community (usually, but not exclusively, women) who have been specially designated for this task.”).

259. WORLD HEALTH ORG., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 11 (2008), [http://www.who.int/reproductive-health/publications/fgm/fgm\\_statement\\_2008.pdf](http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf).

260. *Id.*

261. CTR. FOR REPRODUCTIVE RIGHTS, LEGISLATION ON FEMALE GENITAL MUTILATION IN THE UNITED STATES 1 (2004), [http://www.reproductiverights.org/pdf/pub\\_bp\\_fgm\\_lawsusa.pdf](http://www.reproductiverights.org/pdf/pub_bp_fgm_lawsusa.pdf).

262. *Id.* at 1–2.

263. *Id.*

to reduce a woman's sexual fulfillment.<sup>264</sup> While religion is often cited as a justification for FGM, it is not religious but cultural.<sup>265</sup> The cultures span Christians, Jews, Muslims along with many other indigenous religions in Africa, but the religions' beliefs do not include it.<sup>266</sup> Where most women are subjected to this treatment, the environment creates pressure to continue the practice for social acceptance.<sup>267</sup>

The bottom line of this dilemma is that these women who have been brutally harmed in ways that are outlawed in the United States deserve relief provided by the asylum laws established in our country. However, an easy answer or resolution does not currently exist. This is in part due to the definition of refugee one must satisfy when making his or her asylum claim. The various protected groups listed do not include one specifically for gender or sex. Membership in a particular social group is arguably the most applicable ground.<sup>268</sup> The tension is between its inclusion in the original definition with the purpose of providing an avenue for those not protected by the other grounds combined with decision makers' narrow application of the definition. The irony is that "membership in a particular social group" is not fully serving its intended purpose, and the ones bearing the brunt of its misuse are the applicants dreaming of a better future in this country who have suffered more abuse, mistreatment, violence and persecution than most could ever imagine. After making their claims, they are denied a chance of protection and freedom.

Finding the solution to this quandary should not be left solely to the BIA as they address what membership in a particular social group should mean or how it should be defined. This is partly because the Board will respond using what membership in a particular social group has meant in subsequent case law as well as how the BIA interprets its regulatory framework. And up to this point, none of that history has adequately provided a workable definition for the applicants or a definition that decision makers apply without struggling.<sup>269</sup> Rather, resolving the social group paradox for women who have undergone FGM requires the help of

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264. *Id.*

265. *Id.* at 4.

266. CTR. FOR REPRODUCTIVE RIGHTS, LEGISLATION ON FEMALE GENITAL MUTILATION IN THE UNITED STATES 1 (2004), [http://www.reproductiverights.org/pdf/pub\\_bp\\_fgm\\_lawsusa.pdf](http://www.reproductiverights.org/pdf/pub_bp_fgm_lawsusa.pdf).

267. *Id.* at 2.

268. See generally JOSEPH A. VAIL, ESSENTIALS OF REMOVAL AND RELIEF REPRESENTING INDIVIDUALS IN IMMIGRATION PROCEEDINGS 154–57 (2006).

269. See generally Gerald P. Seipp, *A Year in Review: Circuit Courts Continue Their Activist Role on Behalf of Asylum Applicants*, 85 INTERPRETER RELEASE 2237, 2242 (Aug. 18, 2008) (“[T]he courts continue to issue precedential decisions on various scenarios involving claimed past persecution and/or a reasonable fear of future persecution predicated on subjection to female genital mutilation.”).

the entire immigration community. When examining who the immigration community includes, Congress cannot be overlooked as they have passed various bills reforming immigration laws.<sup>270</sup>

Congress's past enactment of legislation protecting those who have undergone forced population control measures and its current engagement with the FGM issue shows Congress's willingness to ensure the humane treatment of people throughout the world suffering due to the denial of basic human rights. The women who have undergone FGM desire an opportunity to give back to a society that hopefully fights to help them end their long journey to a safe livelihood. They came here because for them it was a matter of life and death. Granting asylum to them legalizes their status in the United States so that they do not contribute to the rising number of thousands of undocumented aliens.

Remember the FGM victim from Mali, Ms. Traore? These FGM victims are like Ms. Traore who came to the United States in October of 2000 and subsequently applied for asylum and withholding of removal.<sup>271</sup> She underwent FGM when she was a young child where her vulva and clitoris were removed in her home country of Mali.<sup>272</sup> Her father also arranged for her to marry her first cousin upon her return to Mali.<sup>273</sup> She fears what will happen if she does not comply with her father's wishes.<sup>274</sup> Many cultures that practice FGM also believe in honor killings when women act in ways where the family is shamed within their culture. At the very least, women are regularly beaten and abused for acting against the family's direction. Ms. Traore managed to escape the misery she was subjected to and came to the United States only to be rejected in part because the courts could not sufficiently apply the meaning of membership in a particular social group. This is crucial to her claim because the perse-

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In a rather remarkable decision, issued in June 2008, the Second Circuit pronounced, in *Bah v. Mukasey* [involving three consolidated cases], that FGM is a continuing harm, analogous to forced abortion or sterilization, thereby constituting persecution on account of a social group defined by their past subjection to this practice. The court explicitly overruled the Board's precedent decision, *In re A-T-*, which ruled to the contrary. *Id.* (footnotes omitted).

270. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Omnibus Consolidated-Appropriations Act for Fiscal year 1997, Pub. L. No. 104-208, 11 Stat. 3009; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, (USA PATRIOT ACT) Real ID Act of 2005, Pub. L. No. 109-13, Div. B, §101(a)(B)(iii), 119 Stat. 231, 302-03 (2005) (establishing a totality of the circumstances test for asylum decisions).

271. *In re A-T-*, 24 I. & N. Dec. 296, 296 (B.I.A. 2007), *vacated*, 24 I. & N. Dec. 617 (A.G. 2008).

272. *Id.*

273. *Id.* at 297.

274. *Id.*



cution she has faced and will face must be on account of her membership in a particular social group. Now, Congress has the opportunity to fight for this group of women that includes Ms. Traore. Some may even say that Congress has an obligation to help this group of women. After all, our nation was founded by another group of strong-willed individuals escaping persecution.

